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14
15 IN THE UNITED STATES DISTRICT COURT
16 FOR THE NORTHERN DISTRICT OF CALIFORNIA
17
18 SAN FRANCISCO DIVISION

19
20 UNITED STATES OF AMERICA,
21 Plaintiff,
22
23 v.
24 DAVID WAYNE DEPAPE,
25 Defendant.

Case No.: CR 22-426 JSC

DEFENDANT'S MOTIONS IN LIMINE

Court: Courtroom 8, 19th Floor
Hearing Date: October 26, 2023
Hearing Time: 11:00 a.m.

26 TO: UNITED STATES OF AMERICA, PLAINTIFF; ISMAIL J. RAMSEY, UNITED
27 STATES ATTORNEY; LAURA VARTAIN HORN, HELEN GILBERT, AND KYLE
28 WALDINGER, ASSISTANT UNITED STATES ATTORNEYS:

29 PLEASE TAKE NOTICE that on October 26, 2023, or as soon thereafter as counsel may be
30 heard, Defendant David Wayne DePape, by and through undersigned counsel, will move the Court to
31 enter the below-requested Orders before trial. These motions are based upon the United States
32 Constitution, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, the attached
33 memorandum of points and authorities, all other applicable statutes and case law, and any further
34 authority and evidence as may be adduced at the pretrial conference.

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INTRODUCTION

David Wayne DePape files the following motions in limine in accordance with the Court's pretrial scheduling order, issued on May 23, 2023. Pretrial Order, Dkt. No. 39-1. Mr. DePape is charged with the following offenses: (1) Attempted Kidnapping of a Federal Officer or Employee—to wit, Nancy Pelosi—in violation of 18 U.S.C. § 1201(d); and (2) Assault of an Immediate Family Member of a Federal Official—to wit, Paul Pelosi—in violation of 18 U.S.C. § 115(a)(1)(A). Indictment, Dkt. No. 3.

ARGUMENT

I. Motion In Limine #1: The Court Should Exclude Witnesses From All Trial Proceedings (Fed. R. Evid. 615)

Federal Rule of Evidence 615 provides that “[a]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses.” Rule 615 is intended to ensure a fair trial by preventing collusion of witnesses and fabrication of testimony, and by helping reveal instances where such fabrication or collusion actually occurs. *See Geders v. United States*, 425 U.S. 80, 87 (1976) (observing that the rule “exercises a restraint of witnesses ‘tailoring’ their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid”); *see also Taylor v. United States*, 388 F.2d 786, 788 (9th Cir. 1967) (stating that exclusion is designed to “prevent the shaping of testimony by hearing what other witnesses say”).

Witnesses should be excluded during motion hearings, opening statements, and closing arguments, as well as during witness testimony. *United States v. Brewer*, 947 F.2d 404, 407–11 (9th Cir. 1991) (holding that witness exclusion under Rule 615 applies during evidentiary hearings, such as those in a motion to suppress); *United States v. Juarez*, 573 F.2d 267, 281 (5th Cir. 1978) (affirming trial court’s decision to exclude defendant’s witnesses from closing arguments, “[b]ecause closing arguments of counsel often restate witness testimony... thus jeopardizing the fairness of a second trial should one be necessary”). Rule 615 requires that non-exempt witnesses be excluded from the courtroom during all witness testimony; that is, that they should remain excluded even after testifying. Fed. R. Evid. 615; *United States v. Ell*, 718 F.2d 291, 293 (9th Cir. 1983) (holding that trial court erred by not excluding prosecution witness who had already testified); *United States v. Sepulveda*, 15 F.3d 1161, 1175–77 (1st Cir. 1993) (holding that in addition to the power to exclude

1 under Rule 615 a district court retains inherent power to, “make whatever provisions it deems
 2 necessary to manage trials,... including the sequestration of witnesses **before, during and after** their
 3 testimony” (citing *Geders*, 425 U.S. at 87)) (emphasis added). Therefore, Mr. DePape requests that
 4 the Court exclude witnesses from the courtroom.

5 **II. Motion In Limine #2: No More Than One “Case Agent” May Be Designated As The**
Government’s Representative (Fed. R. Evid. 615(2))

6 A federal agent, or a local law enforcement officer working with federal agents, qualifies under
 7 Rule 615(2) for exemption from an exclusion order. *See Fed. R. Evid. 615(2); see also United States*
 8 *v. Thomas*, 835 F.2d 219, 222–23 (9th Cir. 1987) (trial court did not err in allowing FBI agent who
 9 also testified to sit at counsel table throughout trial, since agent qualified as officer representing the
 10 government). The plain language of Federal Rule of Evidence 615(2), however, as well as the notes
 11 of the Advisory Committee, indicate that only one agent can be exempted under this provision.

12 The rule speaks of an officer or employee of a party who is not a natural person being
 13 designated as, “its representative.” Fed. R. Evid. 615(2). The drafters chose the singular, rather than
 14 the plural — the rule does not speak of an entity’s right to designate “its representatives.” In fact, the
 15 Advisory Committee stated that, “[a]s the equivalent of the right of a natural-person party, a party
 16 which is not a natural person is entitled to have a representative present.” Fed. R. Evid. 615 Advisory
 17 Committee’s note. As the Sixth Circuit has observed, “[a]’ representative, like ‘a’ natural person, . . .
 18 and ‘an’ officer or employee, is singular. . . we can discern no reason to convert the singular into the
 19 plural.” *United States v. Pulley*, 922 F.2d 1283, 1286 (6th Cir. 1991). The Advisory Committee’s
 20 note, as well as the analysis of this note, supports a literal reading of the rule.

21 Significantly, the majority of Circuit Courts that have addressed the issue of multiple witness-
 22 representatives have concluded that only one agent, officer or employee should be designated under
 23 Rule 615(2). *See id.*; *United States v. Farnham*, 791 F.2d 331, 334–35 (4th Cir. 1986) (holding as
 24 error trial court’s decision to allow two government agent-witnesses to remain in courtroom
 25 throughout trial); *see also United States v. Causey*, 609 F.2d 777, 777–78 (5th Cir. 1980) (not
 26 reaching the issue, but stating in dicta, “from its language it would reasonably be argued that [Rule
 27 615(2)] does not grant counsel for a party the right to designate more than one representative.”);

1 *Oliver B. Cannon and Son v. Fidelity and Cas. Co.*, 519 F. Supp 668, 679 (D. Del. 1981) (exception
 2 codified in Rule 615(2) held to be singular, thus plaintiff was unable to appoint more than one person
 3 as representative).

4 Accordingly, the Court should permit no more than one “case agent” to be designated as the
 5 government’s representative under Rule 615(2).

6 **III. Motion In Limine #3: The Court Should Exempt The Defense Investigator From Witness**
Exclusion Orders (Fed. R. Evid. 615(c))

7 Just as the government is permitted one case agent to be present throughout the trial, the
 8 defense should be permitted the same. The presence of Public Defender investigator Catherine Goulet
 9 at trial is essential to the defense and she should be exempt from any witness exclusion order. She is
 10 in essence the defense’s “case agent.” Rule 615 includes an exception to witness exclusion for “a
 11 person whose presence a party shows to be essential to present the party’s claim or defense.” Fed. R.
 12 Evid. 615(c). This exception has been applied to permit defense investigators to be present at trial,
 13 even when it is anticipated that they may testify. *See United States v. Ortiz*, 10 F. Supp. 2d 1058
 14 (N.D. Iowa, 1998). As the *Ortiz* court noted, exempting an essential defense investigator from a
 15 witness exclusion order is both authorized by statute and required by considerations of fairness:

16 Even one case agent available to the government has access to almost
 17 unlimited law enforcement investigative resources—federal, state, and
 18 local—to perform the necessary footwork if unanticipated issues come up
 19 during trial. Against this full panoply of resources available to the
 20 government, a criminal defendant can reasonably show the presence of
 21 one investigator in the courtroom, who must also then perform the
 22 footwork of necessary investigations and testify upon the results of his or
 23 her investigations, is “essential” within the meaning of the Rule 615(3)
 24 exemption.

25 *Id.* at 1066.

26 Ms. Goulet has been assigned to this case since its inception and is familiar with the facts and
 27 witnesses. It is critical to the defense that she be permitted to remain in the courtroom so she can
 28 respond to witness testimony with prompt investigation and assist defense counsel. Consequently, she
 should be designated as essential and exempt from witness exclusion orders under Rule 615. It is the
 defense’s understanding that the government does not oppose this request.

1 **IV. Motion In Limine #4: The Court Should Designate All Government Witnesses As Under**
 2 **Defense Subpoena Unless Released**

3 Government witnesses noticed for trial occasionally are released by the government without
 4 informing the defense, and thereafter become unavailable. In order for Mr. DePape to retain access to
 5 these witnesses, he requests this Court to order that any released government witnesses be considered
 6 under defense subpoena.

7 Indigent defendants such as Mr. DePape are provided the opportunity to have the government
 8 subpoena witnesses on their behalf by the Sixth Amendment and by Fed. R. Crim. P. 17(b). *United*
 9 *States v. Barker*, 553 F.2d 1013, 1019 (6th Cir. 1997). In addition, this Court has the inherent power
 10 to subpoena witnesses on behalf of indigent individuals. *See Lloyd v McKendree*, 749 F.2d 705, 706–
 11 07 (11th Cir. 1985); *Link v. Wabash*, 370 U.S. 626, 630 (1962) (“The inherent powers of the federal
 12 courts are governed not by rule or statute but by the control necessarily vested in courts to manage
 13 their own affairs so as to achieve the orderly and expeditious disposition of cases.”). To safeguard
 14 against the loss of vital witness testimony and to ensure that this indigent defendant is provided all
 15 Fifth and Sixth Amendment rights, Mr. DePape requests that the Court exercise its inherent power to
 16 order that any released government witnesses be considered under defense subpoena for the duration
 17 of the trial.

18 **V. Motion In Limine #5: The Court Should Exclude Unnoticed And Irrelevant “Other Acts”**
 19 **Evidence, Including Any Reference To False Claims That Mr. DePape Sexually Molested**
 20 **His Children**

21 Mr. DePape moves under Federal Rules of Evidence 404(b) and 403, as well as Federal Rule of
 22 Criminal Procedure 16 and Local Rule 16-1, to exclude all “others acts” evidence from trial. The
 23 Ninth Circuit has made clear that such evidence is generally disfavored, especially in criminal cases.
 24 Moreover, the government here has not provided the requisite procedural notice of intent to offer
 25 such evidence. Nor has the government met its substantive burden of demonstrating the admissibility
 26 of such evidence under the criteria of Rules 404(b) and 403. Accordingly, Mr. DePape respectfully
 27 submits that the Court should exclude any and all “other acts” evidence from trial.

28 **A. Evidence of prior bad acts is disfavored under Rule 404(b)**

29 Rule 404(b) provides that “[e]vidence of other crimes, wrongs, or acts is not admissible to

1 prove the character of a person in order to show action in conformity therewith.” Fed. R. Evid.

2 404(b). The rule goes on to state that such evidence:

3 may, however, be admissible for other purposes, such as proof of motive,
 4 opportunity, intent, preparation, plan, knowledge, identity, or absence of
 5 mistake or accident, **provided that upon request by the accused, the**
6 prosecution in a criminal case shall provide reasonable notice in
7 advance of trial, or during trial if the court excuses pretrial notice on good
 8 cause shown, of the general nature of any such evidence it intends to
 9 introduce at trial.

10 *Id.* (emphasis added). The Ninth Circuit has repeatedly explained that the limitations in Rule 404(b)
 11 are “designed to avoid a danger that the jury will punish the defendant for offenses other than those
 12 charged, or at least that it will convict when unsure of guilt, because it is convinced that the defendant
 13 is a bad man deserving of punishment.” *United States v. Hill*, 953 F.2d 452, 457 (9th Cir. 1991)
 14 (citations and internal quotation marks omitted); *see also United States v. Mayans*, 17 F.3d 1174,
 15 1181 (9th Cir. 1994) (noting that the reluctance to sanction the use of other acts evidence “stems from
 16 the underlying premise of our criminal system, that the defendant must be tried for what he did, not
 17 for who he is”). Moreover, even if admissible under Rule 404(b), such evidence still may be excluded
 18 as unfairly prejudicial, confusing, misleading, cumulative, delaying or a waste of time under Rule
 19 403. *See* Fed. R. Evid. 403.

20 **B. The government has not provided any notice of its intent to offer “other acts”**
21 evidence

22 Under the terms of Rule 404(b), the government must affirmatively and specifically provide
 23 reasonable notice in advance of trial its intention to introduce any particular evidence of “other
 24 crimes, wrongs, or acts.” *See* Fed. R. Crim. P. 404(b)(2); *see also, e.g.*, *United States v. Vega*, 188
 25 F.3d 1150, 1152-53 (9th Cir. 1999) (quoting Rule 404(b)(2)). Similarly, Northern District Criminal
 26 Local Rule 16-1(c)(3) requires the government to disclose “a summary of any evidence of other
 27 crimes, wrongs or acts which the government intends to offer under Fed. R. Evid. 404(b), and which
 28 is supported by documentary evidence or witness statements in sufficient detail that the Court may
 rule on the admissibility of the proffered evidence.” Crim. L.R. 16-1(c)(3); *see also Mayans*, 17 F.3d
 at 1183 (explaining that, without pretrial notice, the trial court cannot “make the focused
 determination of relevance mandated” by Rule 404(b)).

Failure to provide adequate notice, or obtain an excuse from the district court, categorically

1 “renders the other acts evidence inadmissible, whether the evidence is used in the prosecution’s case-
 2 in-chief or for impeachment.” *Vega*, 188 F.3d at 1153. This categorical exclusion even applies to
 3 evidence intended “for possible rebuttal.” *Id.* at 1154. The categorical nature of the exclusion is
 4 further explained in the rule’s advisory committee notes: “Because the notice requirement serves as
 5 **condition precedent** to admissibility of 404(b) evidence, the offered evidence is **inadmissible** if the
 6 court decides that the notice requirement has not been met.” Fed. R. Evid. 404(b) (adv. comm. notes-
 7 1991 amend.) (emphasis added).

8 Moreover, merely “providing such evidence to the defense in discovery is not enough to satisfy
 9 the notice requirements of Rule 404(b), which requires the government specifically to disclose ‘the
 10 general nature of any such evidence it intends to introduce at trial.’” *United States v. Spinner*, 152
 11 F.3d 950, 961 (D.C. Cir. 1998). Indeed, the Ninth Circuit has repeatedly held that the Government
 12 must not only provide notice, but must also identify how the noticed “other acts” evidence “is
 13 relevant to one or more issues in the case; specifically, it must articulate precisely the evidential
 14 hypothesis by which a fact of consequence may be inferred from the other acts evidence.” *United*
 15 *States v. Mehrmanesh*, 689 F.2d 822, 830 (9th Cir. 1982) (citations omitted); *see also United States v.*
 16 *Brooke*, 4 F.3d 1480, 1483 (9th Cir. 1993) (quoting *Mehrmanesh*). Courts have emphasized that the
 17 “incantation of the proper uses of such evidence under the rules does not magically transform
 18 inadmissible evidence into admissible evidence.” *United States v. Morley*, 199 F.3d 129, 133 (3rd
 19 Cir. 1999).

20 Here, the Court set a discovery cut-off date of August 15, 2023, including for materials covered
 21 by Rule 16 and Local Rule 16-1 (citing Rule 404(b)). *See* Dkt. No. 39-1 at 2. To date, the government
 22 has not provided any 404(b) notice regarding any evidence of other crimes, wrongs, or acts
 23 committed by Mr. DePape that it might seek to introduce at trial. As a result, all “other acts” evidence
 24 is categorically inadmissible as a procedural matter pursuant to the authority cited above.

25 This procedural bar is not a mere technicality. The Court has the duty to “make a focused
 26 determination of relevance mandated by” the Federal Rules of Evidence, as well as the local criminal
 27 rules, before any “other acts” evidence may be admitted. *Mayans*, 17 F.3d at 1183; *see also* Crim.
 28 L.R. 16-1(c)(3). The Court cannot, however, make such a determination in this case, because the

1 government has not complied with its requirement of timely notice nor met its burden of proving that
 2 any such evidence is admissible in this case. Accordingly, the Court should preclude the government
 3 as a procedural matter from introducing at trial any “other acts” evidence.

4 **C. The Court should exclude any reference to irrelevant, inflammatory, and baseless
 5 claims that Mr. DePape sexually abused his children**

6 Even where a defendant’s alleged prior “other acts” are not as here procedurally barred by
 7 inadequate notice, the government still must then meet its substantive burden of demonstrating that
 8 such evidence is admissible under Rules 404(b), 401, and 403. Prior acts that are untethered to a
 9 legitimate Rule 404(b) purpose are inadmissible at trial because they raise the forbidden inference
 10 that “the defendant is guilty because he committed another [] crime.” *United States v. Luna*, 21 F.3d
 11 874, 882 (9th Cir. 1994).

12 Specifically, to admit prior acts under this rule, the government must clearly demonstrate why
 13 the proffered “bad” acts evidence “is relevant to one or more issues in the case; specifically, it must
 14 articulate precisely the evidential hypothesis by which a fact of consequence may be inferred from
 15 the other acts evidence.” *Mehrmanesh*, 689 F.2d at 830; *see also Huddleston v. United States*, 485
 16 U.S. 681, 689 (1988) (stating that relevance is not an inherent characteristic, and that prior bad acts
 17 are not intrinsically relevant to motive, opportunity, intent, or absence of mistake); *Mayans*, 17 F.3d
 18 at 1181 (stating that reluctance to sanction use of other bad acts evidence stems from the principle
 19 that “guilt or innocence of the accused must be established by evidence relevant to the particular
 20 offense being tried, not by showing that the defendant has engaged in other acts of wrongdoing”); *see*
 21 *also Morley*, 199 F.3d at 133 (stating that “[e]vidence that is not relevant, by definition, cannot be
 22 offered for a proper purpose, and evidence that may be relevant for some purposes may be irrelevant
 23 for the purpose for which it is offered”).

24 In addition, the government, as the proponent of the proffered “other acts” evidence, must
 25 demonstrate on the merits that each incident meets the requirements of a four-part test developed by
 26 the Ninth Circuit for evaluating the admissibility of such other acts evidence under Rule 404(b).
 27 Specifically, the government must show as to each proffered other act: 1) that the evidence is
 28 sufficient to support a finding that the defendant committed the other act; 2) that introduction of the

1 other act tends to prove a material point at the trial on the charged offense; 3) that the other act is not
 2 too remote in time; and 4) that, in cases where knowledge and intent are at issue, the other act is
 3 similar to the charged offense. *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1013 (9th Cir.
 4 1995); *see also United States v. Curtin*, 489 F.3d 935, 958 (9th Cir. 2007) (en banc) (emphasizing
 5 that the government has the burden of proving the materiality of the element for which the other acts
 6 evidence is offered).

7 Moreover, even if the Court were to determine that the government had met its procedural
 8 disclosure obligations and that it had substantively demonstrated admissibility under Rule 404(b) and
 9 relevance under Rule 401, the Court still must exclude such evidence under Rule 403 if its probative
 10 value is substantially outweighed by the danger of unfair prejudice, or other pertinent considerations
 11 such as wasting time. *See, e.g., Curtin*, 489 F.3d at 958 (“Because evidence of other crimes, wrongs,
 12 or acts carries with it the inherent potential to see the defendant simply as a bad person . . . a trial
 13 court must take appropriate care to see that this does not happen.”).

14 Here, overwhelmingly prejudicial claims have been aired in the media that Mr. DePape
 15 sexually abused his three children years ago. This issue was also brought to the Court’s attention
 16 during change of venue litigation. *See Reply in Support of Motion to Change Venue*, Dkt. No. 48 at
 17 4–5. As noted at that time, and certainly no less true now, such allegations of child sexual abuse and
 18 incest are highly inflammatory, prejudicial, and indeed false. As for any probative value to the
 19 charged offenses, there is absolutely none. Mr. DePape is accused of attempting to kidnap then-
 20 Speaker Nancy Pelosi and assaulting her husband, Paul Pelosi. These charges have nothing to do with
 21 his family’s history. It would strain credulity to even attempt to find any relevance between these
 22 claims of sexual abuse and the incident he is charged with here. Not only that, but this purported
 23 abuse supposedly occurred roughly fifteen years ago—far too remote in time to possibly have any
 24 bearing on the case at hand. Indeed, it is hard to imagine something more inflammatory than these
 25 types of claims. Considering the visceral reaction that many people have towards child sexual abuse,
 26 allowing any evidence of these claims would be unduly prejudicial. It would also confuse the jury as
 27 to why they are hearing about child sexual abuse in this case, waste time because the defense would
 28 be forced to refute the claims, and would invite the jury to punish Mr. DePape because they believe

1 he is a child molester rather than for the actual charges in the case.

2 Finally, and perhaps most importantly, these claims that Mr. DePape sexually abused his
3 children are categorically false and unsubstantiated. The government would be entirely unable to
4 offer sufficient evidence supporting a conclusion that Mr. DePape committed these other acts because
5 that evidence simply does not exist. [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]

4 Accordingly, the Court should exclude any reference to claims that Mr. DePape sexually
 5 abused his children. The government has indicated that it intends to introduce as a trial exhibit Mr.
 6 DePape's recorded post-arrest statement to the SFPD, portions of which reference these allegations.
 7 *See* Chuang Decl., Ex. B (Post-Arrest Interview Audio). The Court should order that this exhibit be
 8 redacted to exclude such references, specifically the portions at the following timestamps: 36:19–
 9 36:37; 36:56–37:06; 37:46–38:07.¹

10 **VI. Motion In Limine #6: The Court Should Exclude Portions Of Body-Worn Camera**
 11 **Footage And Photographs Depicting**

12 [REDACTED]
 13 Under Rule 403, Mr. DePape moves to exclude the following portions of police officers' body-
 14 worn camera footage and photographs depicting [REDACTED]

15 [REDACTED] Specifically, Mr. DePape seeks to exclude the government's
 16 follow proposed trial exhibits:²

- 17 • DEPAPE-0000173: body-worn camera footage from SFPD Officer Willmes, from
 18 01:25–9:50;
- 19 • DEPAPE-0000171: body-worn camera footage from SFPD Officer Najarro, from
 20 00:43–01:38 and 02:14–11:45;
- 21 • DEPAPE-0000406–12; DEPAPE-0000539; DEPAPE-0000543–45; DEPAPE-
 22 0000550–51; DEPAPE-0000666–68; DEPAPE-0000672; DEPAPE-0000734–36;
 23 DEPAPE-0000740–42; DEPAPE-0000753; DEPAPE-0000775–77; DEPAPE-
 24 0000794–813; photographs of alleged crime scene and Mr. Pelosi's injuries;

25 _____

26 ¹ For the Court's reference, a transcript of the interview will be filed as well. The transcript excerpts
 27 that correspond to the timestamps set out above are lines 17–24 on DEPAPE-16674, lines 9–13 on
 28 DEPAPE-16675, and lines 4–17 on DEPAPE-16676. *See* Chuang Decl., Ex. C (Post-Arrest Interview
 Transcript).

² Attached hereto and filed under seal as Exhibits D–H respectively. *See* Chuang Decl., Exs. D–H.

1 • DEPAPE-0002225-27; DEPAPE-0002230-32: photographs of the scene of the alleged
2 crime;
3 • DEPAPE-0002742-56; DEPAPE-0003062-77: photographs of Mr. Pelosi's injuries;
4 and
5 • Any additional similar evidence the government may seek to offer at trial.

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 Mr. Depape is willing to stipulate to the only element of the offense to which this evidence
20 could even remotely bear: that a dangerous weapon (i.e., hammer) was used and/or that the assault
21 resulted in serious bodily injury to Mr. Pelosi. These exhibits are not probative in establishing any
22 disputed issue of fact material to the charged offenses, particularly given the alternative evidence
23 available in the form of testimony from police officers, medical personnel, and Mr. Pelosi himself. As
24 such, admission of this evidence would be unfairly prejudicial and cumulative under Federal Rule of
25 Evidence 403.

1 **A. The Court should exclude evidence if its probative value is substantially**
 2 **outweighed by the danger of unfair prejudice and needlessly presenting**
 3 **cumulative evidence, especially when the defense is willing to stipulate to the**
 4 **element of the offense on which the evidence bears**

5 Rule 403 provides that “[t]he court may exclude relevant evidence if its probative value is
 6 substantially outweighed by a danger of . . . unfair prejudice . . . or needlessly presenting cumulative
 7 evidence.” Fed. R. Evid. 403. Unfair prejudice is “an undue tendency to suggest a decision on an
 8 improper basis, commonly . . . an emotional one.” Fed. R. Evid. 403 (adv. comm. note). Unfair
 9 prejudice “speaks to the capacity of some concededly relevant evidence to lure the factfinder into
 10 declaring guilt on a ground different from proof specific to the offense charged.” *Old Chief v. United*
 11 *States*, 519 U.S. 172, 180 (1997).

12 While the government generally has discretion to try its case using whatever admissible
 13 evidence it chooses, where a defendant offers to stipulate to an element of a charged offense, this
 14 must be weighed in the balancing test for Rule 403 to determine whether the evidence should be
 15 admitted. *Old Chief*, 519 U.S. at 186–87; *see also United States v. Merino-Balderrama*, 146 F.3d
 16 758, 762 (9th Cir. 1998) (“*Old Chief* held that a defendant’s offer to stipulate to an element of a crime
 17 is relevant evidence that must be factored into a district court’s analysis under Rule 403.” (citation
 18 and footnote omitted)) (reversing conviction where district court admitted images of child
 19 pornography at trial notwithstanding defendant’s offer to stipulate). In *Old Chief*, the Supreme Court
 20 emphasized that “a party’s concession is pertinent to the court’s discretion to exclude evidence on the
 21 point conceded,” and that “[s]uch a concession . . . will sometimes call for the exclusion of evidence
 22 offered to prove [the] point conceded by the opponent.” 519 U.S. at 184 (internal quotations omitted).
 23 While factually *Old Chief* concerned the right of a defendant to stipulate to a prior felony conviction
 24 as an element of the offense of possession of a firearm by a convicted felon, the case stands for the
 25 broader proposition that, while the government should be afforded latitude in constructing the
 26 narrative that forms the basis of its case, that latitude is subject to limitations to avoid unfair prejudice
 27 under Rule 403. *See id.* at 190.

28 Mr. DePape is charged with two offenses: attempting to kidnap Nancy Pelosi (Count 1) and
 29 assaulting Paul Pelosi (Count 2). *See* Dkt. 3. The graphic videos and photographs have no relevance

1 to the kidnapping offense, which contains no element of physical contact, nor injury, nor use of a
 2 weapon; and which does not even involve Mr. Pelosi. *See* 18 U.S.C. § 1201(d). Nor are they relevant
 3 to the core elements of the assault offense, including federal jurisdiction, intent, threat, or physical
 4 contact. *See* 18 U.S.C. § 115(a)(1)(A). The government can satisfy core elements of the assault
 5 offense easily by showing that the hammer made unwanted contact with Mr. Pelosi. *See, e.g., United*
 6 *States v. Lewellyn*, 481 F.3d 695, 698 (9th Cir. 2007) (holding that when defendants make unwanted
 7 physical contact with victims, they satisfy the element of assault). Thus, the alleged physical contact
 8 element was completed when the hammer made contact with Mr. Pelosi. *See id.*

9 The government can, therefore, prove the core elements of the assault by showing only the
 10 events that happened in the seconds preceding Mr. Pelosi falling to the floor. And because police
 11 officers tackled Mr. DePape to the floor and apprehended him immediately after the incident with
 12 Mr. Pelosi, any further conduct after that point is irrelevant to either the assault or kidnapping
 13 offenses.

14 The only conceivable relevance the graphic videos and photographs have here is as proof that
 15 Mr. DePape meets the requirements for an enhanced penalty. Mr. DePape faces a potential 30-year
 16 maximum sentence based on two possible findings, either of which, on its own, satisfies the
 17 requirements for the enhanced penalty: that a dangerous weapon was used, or that the assault resulted
 18 in serious bodily injury to the victim. *See* 18 U.S.C. § 115(b)(1)(iv) (allowing for increased maximum
 19 sentence of 30 years in prison “if the assault resulted in serious bodily injury” or if “a dangerous
 20 weapon was used during an in relation to the offense”); *see also Apprendi v. New Jersey*, 530 U.S.
 21 466, 476 (any fact that increases the maximum penalty for a crime must be charged in the indictment
 22 and proven to the jury). As to the allegation that a dangerous weapon was used, the graphic videos
 23 and photographs have no or at most extremely marginal relevance because the proposition that a
 24 hammer is a dangerous weapon is an obvious one, and at the very least, the jury could easily find that
 25 the hammer was dangerous based on seeing Mr. Pelosi fall to the ground alone, without being shown
 26 graphic images.

27 Thus, any relevance of the graphic videos and photos of Mr. Pelosi pertains only to the “serious
 28 bodily injury” means of proving the enhanced-penalty element, which is one of two independent

1 ways the government may establish this element, illustrating that the probative value of this evidence
 2 is quite minimal and superfluous. But its probative value is even lower because Mr. DePape does not
 3 dispute and is willing to stipulate to both ways of establishing the enhanced-penalty *Apprendi*
 4 element: that Mr. Pelosi suffered serious bodily injury and that a dangerous weapon, i.e., a hammer,
 5 was used during and in relation to the offense. *See* 18 U.S.C. § 115(b)(1)(B)(iv). This stipulation is
 6 “not merely relevant but seemingly conclusive evidence of the [enhanced-penalty] element.” *Old*
 7 *Chief*, 519 U.S. at 186.

8 **B. The defense’s offered stipulation would obviate the need to present the unfairly
 9 prejudicial evidence, and hence also radically reduce its probative value**

10 Evidence containing graphic and disturbing sounds and imagery is especially likely to carry a
 11 substantial risk of unfair prejudice, and excluding such evidence is often warranted under Rule 403.
 12 *See United States v. Salim*, 189 F. Supp. 2d 93, 98 (S.D.N.Y. 2002). For example, in *Salim*, the court
 13 thoroughly reviewed the federal case law on Rule 403 objections to bloody photographs of victims
 14 and concluded that “the graphic or disturbing nature of a photograph alone is not enough to render it
 15 inadmissible. Rather, the analysis hinges upon whether the photograph is relevant to some disputed
 16 point at trial or otherwise aids the jury in a factual determination.” *Id.* (citations omitted). Where
 17 photographs offered in evidence have little or no probative value concerning an issue disputed at trial,
 18 they are inadmissible. For example, the Seventh Circuit held that color photographs of a bar floor
 19 covered with the victim’s blood in a murder case should have been excluded under Rule 403. *Ferrier*
 20 *v. Duckworth*, 902 F.2d 545 (7th Cir. 1990). “The killing was not denied; the only issues were
 21 whether Ferrier had been drunk or insane when he did the killing. Those issues were not illuminated
 22 by the photographs. The only conceivable reason for placing them in evidence was to inflame the jury
 23 against Ferrier.” *Id.* at 548. The court applied the same analysis in a subsequent case where graphic
 24 photographs were introduced to display gunshot wounds suffered by the victim, noting that neither
 25 the fact of the victim’s death nor the cause of the death were disputed at trial. *Gomez v. Ahitow*, 29
 26 F.3d 1128, 1139 (7th Cir. 1994).

27 [REDACTED]

28 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]. Thus, as in
 4 *Ferrier*, given Mr. DePape's offer to stipulate, there is no need for the government to offer graphic
 5 images in evidence to prove either the dangerous-weapon or injury element; the only conceivable
 6 reason the government may have for offering the graphic videos and photographs is for their
 7 inflammatory and sensationalist effect on the jury. *See* 902 F.2d at 548.

8 On the other end of the spectrum, courts have been reluctant to exclude photographic evidence
 9 under Rule 403 when it does not depict images so graphic as to generate an improper emotional
 10 response from the jury, *see, e.g.*, *United States v. Pineda-Doval*, 614 F.3d 1019 (9th Cir. 2010), or
 11 when the evidence may elicit a slight emotional response from the jury yet is highly probative of a
 12 central issue at trial, *see, e.g.*, *United States v. Brady*, 579 F.2d 1121 (9th Cir. 1978). For example, in
 13 *Pineda-Doval*, the Ninth Circuit held that admission of photographs of uninjured accident victims
 14 was not prejudicial under Rule 403. 614 F.3d at 1036. The court deemed the picture of one victim
 15 “unremarkable” since it merely depicted him “sitting on gravel, looking stunned and perhaps a little
 16 sad, but uninjured.” *Id.* The court found that a photograph of a second victim, who died in the
 17 accident in question, was not prejudicial since it was a “family photograph taken well before the
 18 accident” and merely depicted the victim “standing by herself with no expression on her face.” *Id.*
 19 Likewise, in *Brady*, an alien smuggling case, the Ninth Circuit held that there was no undue prejudice
 20 under Rule 403 of photographs of aliens inside the drive-shaft compartment of the vehicle in which
 21 they were being transported. 579 F.2d at 700. The court reasoned that the photographs provided the
 22 “best and clearest evidence” that was “probative of the central issue at trial.” *Id.* While the court
 23 acknowledged that there was “some potential that the jurors would have an emotional response to the
 24 photograph,” the potential for unfair prejudice was nevertheless low since the photograph was “not so
 25 graphic or shocking that it would be likely to engender a strong and improper emotional response
 26 against the Defendant,” particularly since the photograph merely showed the aliens looking
 27 “frightened and bewildered.” *Id.*

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]

15 [REDACTED] This risk substantially outweighs the probative value of the videos and photographs in
16 proving serious bodily injury or the use of a dangerous weapon, to which the defense is willing to
17 stipulate, and which the government can easily establish by other, less prejudicial means in any event,
18 as argued below.

19 C. **The availability of less prejudicial evidentiary alternatives diminishes the marginal
20 probative value of the videos and images in question and heightens the risk of
21 unfair prejudice if the government chooses to nevertheless use a *more* prejudicial
22 means of proving the same issue**

23 Rule 403 also excludes evidence that is needlessly cumulative. Fed R. Evid. 403. And both the
24 Advisory Committee's notes, as well as case law discussing Rule 403, indicate that the availability of
25 alternative evidence to establish a given fact is a relevant consideration in weighing the probative
26 value of the evidence against the risk of unfair prejudice. *See, e.g.*, Fed. R. Evid. 403 (adv. comm.
27 note); *see also United States v. McNeil*, 166 F.3d 943, 946 (9th Cir. 1999) (requiring the use of phrase
28 "residential program" rather than "work release center" to avoid indirectly presenting evidence of
defendant's prior criminal convictions to the jury). For example, in *Old Chief*, the Supreme Court

1 emphasized that if an item of evidence is found to carry a substantial risk of unfair prejudice and less
 2 prejudicial alternatives are available, “sound judicial discretion would discount the value of the item
 3 first offered.” 519 U.S. at 183. Critical to the holding in *Old Chief* was the fact that “the functions of
 4 the competing evidence are distinguishable only by the risk inherent in the one and wholly absent
 5 from the other.” *See id.* at 191.

6 Here, there is ample alternative evidence—in addition to the defense’s offered stipulation—to
 7 establish that Mr. Pelosi suffered serious bodily injury and that the hammer used in the incident is a
 8 dangerous weapon—either one of which would be independently sufficient to establish that Mr.
 9 DePape is subject to an enhanced penalty. For example, instead of offering the graphic body-worn
 10 camera footage and photographs to prove serious bodily injury, the government can offer the
 11 testimony of the SFPD officers that responded to the Pelosi home on the night in question, or of
 12 course, from Mr. Pelosi himself. As to the dangerous-weapon element, the government can simply
 13 show the video of the hammer making contact with Mr. Pelosi and his falling to the ground, it can
 14 enter the hammer itself into evidence, and it can elicit testimony from the responding officers or Mr.
 15 Pelosi about the hammer and its dangerousness.

16 As to the probative value of the evidence, because the government can make use of alternative
 17 evidence that is relevant on the same issues as the images and videos in question, their marginal
 18 probative value—relative to the alternatives—is minimal. This is particularly true where, as here, the
 19 defense does not dispute the enhanced-penalty element to Count Two and has offered to stipulate to
 20 both means of establishing the element. The available alternatives, as well as this stipulation, render
 21 the evidence the government seeks to admit as cumulative under Rule 403. Additionally, the lower
 22 marginal probative value of the evidence here given the alternatives—compared against the high risk
 23 of unfair prejudice—further supports exclusion under Rule 403. Accordingly, the availability of non-
 24 prejudicial evidentiary alternatives warrants exclusion of the videos and images in question under
 25 Rule 403 both for its prejudicial effect and as needlessly cumulative.

26 Thus, the Court should exclude the specified photographs and portions of body cam footage.
 27 [REDACTED]

1 unfair prejudice substantially outweighs the evidence's extremely limited probative value given that
 2 the defense is willing to stipulate to both ways of establishing the enhanced-penalty element of Count
 3 Two, and that there exist ample non-inflammatory ways for the government to establish that element,
 4 thus also rendering the evidence cumulative.

5 **VII. Motion In Limine #7: The Court Should Also Exclude Under Rule 403 The Testimony Of**
The Government's Three Proposed Physician Witnesses As Wasting Time And Needlessly
Presenting Cumulative Evidence

6 Mr. DePape also asks the Court to exclude the government's proposed testimony from Dr.
 7 Michael Huang, Dr. Geoffrey Manley, and Dr. Steven Straube, all of whom were physicians at San
 8 Francisco General Hospital, who treated Mr. Pelosi the night of the charged conduct. Their
 9 testimony's only conceivable relevance to any element of the charged offenses would be to the
 10 *Apprendi* enhanced-penalty element for the assault charge, i.e., to establish that Mr. Pelosi suffered a
 11 "serious bodily injury." *See* 18 U.S.C. § 115(b)(1)(B)(iv). As noted above, however, the government
 12 need only prove either that a serious bodily injury resulted from the offense, or that a dangerous
 13 weapon was used during and in relation to it—not both. *See id.* Nevertheless, Mr. DePape is willing
 14 to stipulate to both prongs of the enhanced-penalty element, meaning that this proposed physician
 15 testimony does not even concern a disputed fact in this case, but instead only a collateral issue.
 16

17 Further, as noted above, in addition to Mr. DePape's offered stipulation, there is already ample
 18 other testimony establishing this penalty element, including testimony from responding officers and
 19 Mr. Pelosi, who will no doubt testify that he was seriously injured. And the dangerous-weapon
 20 variant of the penalty element will likewise be incredibly obvious from the video showing a hammer
 21 making contact with Mr. Pelosi's head, and from the testimony of Mr. Pelosi and the officers who
 22 witnessed the event. Accordingly, any probative value of these physicians' testimony is incredibly
 23 minimal. By contrast, this minimal probative value is substantially outweighed by the danger of
 24 undue delay, wasting time, and needlessly presenting cumulative evidence. *See* Fed. R. Evid. 403;
 25 *see, e.g., United States v. Hooton*, 662 F.2d 628, 636 (9th Cir. 1981) (finding no abuse of discretion
 26 in excluding "marginally relevant" cumulative evidence that the defendant was a hobbyist gun
 27 collector, when numerous other witnesses testified to the same). At the very least, the Court should
 28 limit the government to presenting the testimony of a single physician concerning Mr. Pelosi's

1 injuries. *See id.*

2 **VIII. Motion In Limine #8: The Court Should Permit Counsel To Inquire During Voir Dire**
 3 **About Prospective Jurors' Political Party Affiliations And Whether They Voted For Or**
 4 **Against Nancy Pelosi**

5 At the hearing on Mr. DePape's motion to transfer venue, the Court stated that it intended to
 6 conduct a thorough and extensive voir dire of prospective jurors because of the extensive pretrial
 7 publicity concerning this case. The Court specifically mentioned, however, that it was unsure whether
 8 it was permissible to conduct voir dire concerning prospective jurors' political affiliation or whether
 9 they had voted for or against Nancy Pelosi (if they currently or previously resided in her district).³
 Such voir dire questioning is both permissible and appropriate in this case.

10 “*Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment
 11 right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge’s
 12 responsibility to remove prospective jurors who will not be able impartially to follow the court’s
 13 instructions and evaluate the evidence cannot be fulfilled. Similarly, lack of adequate *voir dire*
 14 impairs the defendant’s right to exercise peremptory challenges where provided by statute or rule, as
 15 it is in the federal courts.” *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). Especially in
 16 high-profile trials with a political valence, such as this one, voir dire about prospective jurors’
 17 political views and attributes is appropriate and necessary. *See, e.g., United States v. Dellinger*, 472
 18 F.2d 340, 367–70 (7th Cir. 1972) (finding that district court erred in the Chicago Seven trial by
 19 conducting insufficient voir dire of prospective jurors about political attitudes relevant to the trial);
 20 *Cordero v. United States*, 456 A.2d 837, 841–45 (D.C. 1983) (reversing conviction for disrupting
 21 Congress by an anti-war protestor because trial court failed to ask in voir dire questions about, inter
 22 alia, whether prospective jurors’ or their close friends’ or family’s membership in “any organization
 23 which had as one of its objectives opposition to Communism”). Indeed, “[c]ourts have held that
 24 controversial matters requiring careful inquiry include . . . political attitudes.” *Cordero*, 456 A.2d at
 25 842 (collecting cases); *see also Dellinger*, 472 F.2d at 368 (“Some questions may appear tangential to
 26 the trial but are actually so integral to the citizen juror’s view of the case, especially one with publicly
 27

28 ³ The Court could also obviate the need to ask this question by removing all prospective jurors who
 are currently represented by Ms. Pelosi.

1 controversial issues, that they must be explored.”).

2 As to voir dire about political party affiliation or whether a prospective juror voted for an
 3 elected official who was an alleged victim of a criminal offense, the Ninth Circuit has not
 4 categorically prohibited such inquiry. The only Ninth Circuit decision to touch on this topic that
 5 undersigned could locate is *United States v. Goland*, which was a prosecution charging the defendant
 6 with violating campaign-finance laws in the 1986 United States Senate election in California. *See id.* at 959
 7 F.2d 1449, 1451 (9th Cir. 1992). The defendant supported the incumbent Democrat and spent money
 8 on television commercials supporting a third-party candidate in an effort to syphon votes away from
 9 the Republican candidate; however, Goland falsely stated that the commercials were paid for by the
 10 third-party candidate’s committee, not himself. *See id.* at 1451–52. The district court did not allow
 11 Goland to question prospective jurors about which candidate they voted for in the 1986 election or
 12 with which political party they were registered. *See id.* at 1454.

13 While the Ninth Circuit found no abuse of discretion in this ruling, the court notably did not
 14 hold that asking such questions was categorically improper. *See id.* Instead, the court emphasized that
 15 it found no abuse of discretion in that specific case because other politics-related questions that were
 16 asked, such as “whether they had voted in the 1986 election, were active in politics, had participated
 17 in any federal campaign, or were familiar with the FEC or federal election law,” as well as “whether
 18 any of the potential jurors supported [the candidates] in the 1986 election in a way other than voting,
 19 such as by actively campaigning or contributing campaign funds.” *See id.* Here, unlike in Goland,
 20 however, this case directly involves an elected official as the alleged victim of the offense. *Cf. id.*
 21 Asking prospective jurors about their attitudes toward an alleged victim of an offense is always
 22 highly salient. Indeed here, if a prospective juror has a significant bias in favor of Nancy Pelosi by
 23 virtue of having voted for her such that they would be unable to fairly evaluate the facts adduced at
 24 trial, such information would result in excusal for cause, in addition to being relevant to Mr.
 25 Depape’s reasonable use of peremptory challenges. Accordingly, in light of the specific nature of this
 26 case, which involves a prominent elected official as an alleged victim, the Court should permit
 27 inquiry during voir dire into prospective jurors’ political party affiliation, and whether they ever
 28 voted for Nancy Pelosi.

1 **IX. Motion In Limine #9: Due To The Extensive Prejudicial Pretrial Publicity In This Case,**
 2 **The Court Should Increase The Number Of Peremptory Challenges To Mitigate The Risk**
 3 **Of Biased Jurors**

4 Ordinarily, in a non-capital felony trial, the government receives six peremptory challenges,
 5 and the defendant receives 10. *See Fed. R. Crim. P. 24(b)(2)*. But in cases that have been subject to
 6 extensive prejudicial pretrial publicity, district courts may increase the number of peremptory
 7 challenges in order to ensure the defendant's Sixth Amendment right to a fair trial. *See, e.g., United*
 8 *States v. Blom*, 242 F.3d 799, 804 (8th Cir. 2001) (finding no abuse of discretion in district court's
 9 denial of motion to change venue because district court took measures to mitigate the effect of
 10 pretrial publicity, including "increasing the number of peremptory strikes for each side"); *United*
 11 *States v. Williams*, No. CR 06-00079 JMS-KSC, 2014 WL 712598, at *4 (D. Haw. Feb. 21, 2014)
 12 (recognizing authority to grant additional peremptory challenges based on extensive pretrial
 13 publicity). Mr. DePape respectfully requests that the Court grant the defense an additional 10
 14 peremptory challenges, i.e., a total of 20, to mitigate against the pervasive negative pretrial publicity
 15 about Mr. DePape and his alleged conduct.

16 As outlined in Mr. DePape's motion to transfer venue, the alleged offense and this trial have
 17 been the subject of extensive pretrial publicity, with 77% of prospective jurors in the San Francisco
 18 Division being already familiar with this case and 77% of prospective jurors already believing Mr.
 19 DePape is guilty of assaulting Paul Pelosi. *See Dkt. 41 at 5–11; Dkt. 44-1 at 2–3*. Even more
 20 concerning, a large majority of prospective jurors said they would have a difficult time being
 21 convinced that Mr. DePape is not guilty, with Mr. DePape facing a presumption of guilty rather than
 22 of innocence. *See Dkt. 44-1 at 4* (68.2% of San Francisco jurors would have a hard time being
 23 convinced that Mr. DePape is not guilty of assaulting Paul Pelosi). In cases with such high levels of
 24 pretrial publicity, courts will grant additional peremptory challenges to mitigate the risk of seating
 25 biased jurors. *See Blom*, 242 F.3d at 204 (affirming granting of additional peremptory challenges
 26 when a highly publicized search for a missing sales clerk preceded defendant's arrest in relation to
 27 her rape and murder); *United States v. Moussaoui*, No. CR. 01-455-A, 2002 WL 1987955, at *1 (E.D.
 28 Va. Aug. 16, 2002) (granting additional peremptory challenges in trial of Zacarias Moussaoui for
 29 conspiracy to commit the 9/11 attacks); *United States v. Bonanno*, 177 F. Supp. 106, 123 (S.D.N.Y.

1 1959) (granting additional peremptory challenges in order to mitigate prejudicial pretrial publicity in
 2 case involving mafia figures).

3 Likewise, the American Bar Association's influential *Criminal Justice Standards* have long
 4 suggested that granting additional peremptory challenges in cases that have "been the subject of
 5 significant publicity." See ABA, *Criminal Justice Standards: Fair Trial and Public Discourse* § 8-
 6 5.3(e) (2013), available at https://www.americanbar.org/groups/criminal_justice/standards/crimjust_standards_fairtrial_blk/ (last accessed Sept. 26, 2023). And courts have looked to these
 7 standards when deciding whether to grant additional peremptory challenges in high-publicity cases.
 8 See, e.g., *Newcomb v. State*, 800 P.2d 935, 940 (Alaska Ct. App. 1990) (noting that Alaska courts
 9 have adopted this ABA standard "broadening the defendant's right to disqualify jurors for cause in a
 10 high publicity case" and encouraged "trial judges to freely allow additional peremptory challenges in
 11 high publicity cases").

13 Here, in light of the extensive, negative pretrial publicity, see Dkt. 41 at 5–11, Mr. DePape
 14 respectfully requests that he receive 10 additional peremptory challenges for a total of 20, to mitigate
 15 the effect of the prejudicial publicity. Because the pretrial publicity has been far more prejudicial to
 16 the defense, and because only Mr. DePape has a Sixth Amendment right to a trial before an impartial
 17 jury, affording only Mr. DePape additional peremptory challenges is warranted. See, e.g., *Bonanno*,
 18 177 F. Supp. at 123 ("award[ing] the defense 42 peremptory challenges, which is 32 more than is
 19 required by the Federal Rules of Criminal Procedure, while the government will be held to its 6
 20 challenges" based on pretrial-publicity concerns). At the very least, Mr. DePape respectfully requests
 21 the Court double the number of peremptory challenges for both parties, granting Mr. DePape 20 and
 22 the government 12.

23 **CONCLUSION**

24 For the foregoing reasons, Mr. DePape respectfully requests that the Court grant his motions in
 25 limine as set forth above.

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2 Dated: September 27, 2023
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Respectfully submitted,

4 _____ /S
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